No. 80-2165

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES M. MURPHY, District Judge of the Fourth Judicial District of the State of Nebraska, Douglas County, Nebraska,
Appellant,

vs.

EUGENE L. HUNT,

Appellee.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF LAWS AT WORK (L.A.W.), JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE (IACP), THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION (NDAA), THE STATE OF CALIFORNIA AND THE STATE OF DELAWARE, AS AMICI CURIAE IN SUPPORT OF THE APPELLANT

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. Paul L. Douglas, Attorney General of the State of Nebraska, Counsel for Appellant, and Bennett G. Hornstein, Esq., Counsel for Appellee. Letters of Consent of both parties have been filed with the Clerk of this Court. States are not required to obtain consent to file as *Amici Curiea.*

INTEREST OF AMICI

The parties to this brief share a common interest in the case at bar. Laws At Work is a citizens non-profit corporation dedicated to reforming the criminal justice system to one that represents the best interests of law enforcement, law-abiding citizens and victims of crimes. Laws At Work was founded as Citizens for Law Enforcement Needs for this specific purpose by the late Don Belding, Doris Dolan, and Dr. C. Erwin Piper.

For more than 15 years, Laws At Work has been under the direction of Doris Dolan in its efforts to change those laws and

procedures which have placed the rights of the law breaker over those of the law-abider. This organization is active in legislative and judicial reform to assure the public greater safety from those who have chosen to prey upon the law-abiding. Its members are active participants in state and national criminal justice and law enforcement activities, public and private. In addition, its members have been active in speaking before state and national legislative committees and fact-finding commissions, such as the Attorney General's Task Force on Violent Crimes, seeking to provide the vital input of the citizen's point-of-view on the crime problem in our society.

As a non-profit citizens corporation, it has taken seriously the charge given to it by then Governor Ronald Reagan, in 1973, when he served as the honorary Chairman of the California Conference on the Judiciary sponsored by L.A.W., saying:

> "Last year you established an important precedent by being the first to pursue court reform on an organized basis pursuant to a challenge by the Chief Justice of the United States, Warren Burger. And it was an impressive precedent! Your report and recommendations have received widespread national publicity and acclaim . . .
>
> "Part of its greatness comes from the fact that this conference was initiated by interested citizens not involved in the judicial system . . . Volunteer citizens intermeshed with government can produce something of which we can all be proud.
>
> "Now, the question is, 'How do we implement these recommendations?' "

The National District Attorneys Association is the sole national organization representing state and local prosecuting attorneys in America. Its programs of education, training, publications and *amicus curiae* activity in the courts, carries out its guiding purpose since its founding in 1950, of reforming the criminal justice system for the benefit of all our citizens, in particular the law-abiding and those who are the innocent victims of crime.

The International Association of Chiefs of Police is the largest professional association of police executives, police legal advisors and rank and file police officers in the world, consisting of more than 12,600 members in 62 nations. Among its concerns are the rights of innocent victims of crime, including those victimized by violent sex offenders. It seeks restoration of a balance in our criminal justice system that will adequately protect the interests of our law-abiding citizens from those who choose a criminal way of life. Further, the IACP strives to improve the quality and efficiency of law enforcement through improved management techniques and training. These goals are difficult to achieve when countless hours are expended in arresting those individuals that have committed other crimes while released on bail or have failed to appear in court.

The Attorneys General of the States of California and Delaware are the chief law enforcement officers of their states with oversight for the fair and effective enforcement of the criminal laws therein.

Amici will address in this brief the legal issues raised in connection with Article I, Section 9 of the Constitution of the State of Nebraska and the policy issues that require legislative and state constitutional action to protect those victimized by violent sex offenders.

We do not forget, however, that our Society is daily victimized by many other categories of offenders, such as narcotics distributors and sellers, whose violence against the total fabric of our social institutions, as well as violence to the lives and well-being of our individual citizens and their families, is rampant. We believe that the time is at hand for a total examination of our state and federal bail structure and procedures, with the emphasis on judicial discretion exercised for the protection of *all* victims of crimes. We desire a balance to be struck that will put bail in its proper perspective of protecting society from the violence—direct and indirect—of all those who choose careers in crime.

FACTUAL AND PROCEDURAL SETTING OF THIS CASE

In November of 1978, Article I, Section 9 of the Constitution of the State of Nebraska was amended to provide:

> All persons shall be bailable by sufficient sureties, except for treason, *sexual offenses involving penetration by force or against the will of the victim,* and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Nebraska Constitution, Article I, Section 9 (Language added by Amendment emphasized).

Subsequent to the constitutional amendment set out above, the appellee was charged in the District Court of Douglas County, Nebraska, with multiple counts of forcible first degree sexual assault. For purposes of bail consideration only, the appellee stipulated that the proof was evident and the presumption was great and the Douglas County District Court, the Honorable James M. Murphy, appellant herein, denied bail.

Thereafter, the appellee sought habeas corpus relief in the United States District Court for the District of Nebraska and filed a civil rights action against Judge Murphy seeking certain declaratory relief. The United States District Court for the District of Nebraska, denied all requested relief and this appeal followed.

The decision in the combined cases of *Hunt* v. *Roth* and *Hunt* v. *Murphy* was filed by the United States Court of Appeals for the Eighth Circuit on May 13, 1981, and is reported at 648 F. 2d 1148.

ARGUMENT

I.

A STATE CONSTITUTIONAL AMENDMENT WHICH DENIES BAIL TO PERSONS CHARGED WITH, INTER ALIA, SEXUAL OFFENSES INVOLVING PENETRATION BY FORCE OR AGAINST THE WILL OF THE VICTIM WHERE PROOF IS EVIDENT OR THE PRESUMPTION GREAT DOES NOT VIOLATE THE UNITED STATES CONSTITUTION.

Amici will not reiterate at any length the legal arguments made by the appellant in this case, although we are in complete accord with such arguments and wish to associate ourselves with and express our complete support for them. We believe these arguments to be compelling and will supplement the most pertinent legal issues briefly before focusing upon the important policy issues presented by this case. Primarily, *amici* will address these policy questions and their importance to the effectiveness of law enforcement efforts and the societal impact involved.

A.

The 1978 Amendment of Article I, Section 9, of The Constitution of Nebraska Does Not Violate the Eighth Amendment to the United States Constitution.

By the terms of its language, its historical development and subsequent judicial determinations, the Eighth Amendment to the United States Constitution does not create a right to bail, be it absolute or qualified. This Amendment provides only that "excessive bail shall not be required." The Amendment is not addressed to the states, nor has it been incorporated and made applicable to the states through the due process clause of the Fourteenth Amendment.

The language of the Eighth Amendment s clear on its face. It simply does not provide a right to bail. The federal government does not now, nor has it in the past, treated bail as a right for all offenses. The Judiciary Act of 1789, passed by Congress shortly before the Eighth Amendment was adopted, provided for bail only in non-capital criminal cases, with the right to bail in capital offenses vested in the discretion of trial judges. It must be noted that in 1789, this Act served to deny bail on a broad basis, since all felonies then were capital offenses. *Forcible Rape and the Right to Bail,* 17 San Diego L. Rev. 1061, 1080 n. 98 (1980).

Currently, various federal statutes and rules deny bail in specific categories of offenses. These include the Federal Rules of Criminal Procedure § 46(a)(1), (a)(2) and the Bail Reform Act of 1966 (18 U. S. C. §§ 3141-3152), where judicial discretion may be exercised to deny bail in capital cases. The Internal Security Act of 1950 gives the Attorney General discretion to detain or release defendants. See *Preventive Detention,* 36 Geo. Wash. L. Rev. 178 (1967). While these provisions permit denial of bail to secure the defendant's appearance at trial, 18 U. S. C. §§ 4244-4248 (1964) authorizes the federal courts to deny bail to the mentally incompetent, which may be considered additional protection for society. This concept is explored in some detail below.

The various constitutions of the states provide a wide array of exceptions to, and limitations upon, any asserted fundamental right to bail. Only nine states have a counterpart to the Eighth Amendment prohibiting excessive bail. Thirty-one states deny bail in capital offenses in certain circumstances. Two states deny bail for murder or treason. Michigan denies bail, *inter alia,* when a defendant is awaiting the disposition of a prior violent felony charge, and for those defendants who are on probation or parole as a result of a prior conviction for a violent felony. Utah has a similar provision, but also includes a denial of bail to defendants free on bail awaiting trial on a previous felony charge. *Forcible Rape and The Right to Bail,* 17 San Diego L. Rev. 1061, 1066-67, n. 29 (1980).

B.

The 1978 Amendment of Article I, Section 9, of the Constitution of Nebraska Does Not Violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

In the absence of a finding that there is a fundamental right to bail, or that a suspect class is involved, a rational basis test is applicable for the determination of a violation of the Equal Protection Clause. Rights which have been deemed to be fundamental include the right to travel, *Shapiro* v. *Thompson,* 394 U. S. 618 (1969); the right to vote, *Harper* v. *Virginia Bd. of Education,* 383 U. S. 663 (1966); the right to privacy, *Griswold* v. *Connecticut,* 381 U. S. 479 (1965); the right to equal access to appellate review, *Griffin* v. *Illinois,* 351 U. S. 12 (1956); the right to marry and procreate, *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942); and all first amendment rights. Suspect classes include alienage, *Graham* v. *Richardson,* 403 U. S. 365 (1971); race, *Loving* v. *Virginia,* 388 U. S. 1 (1967); and national origin, *Korematsu* v. *United States,* 323 U. S. 214 (1944).

The right to bail is not a fundamental right, as must be apparent from the federal and state laws which have denied bail since the founding of our country. Furthermore, it cannot reasonably be contended that rapists are a constitutionally suspect class. The act is a willful one and does not portend a status such as race, alienage or national origin. The question before this court then becomes whether the Nebraska constitutional amendment is founded on a rational basis. The purpose of this bail provision is twofold: to assure the appearance of defendants at trial *and* to protect the safety of the law-abiding populace. Any question of whether these goals have a legitimate state purpose is ludicrous in its statement. An analysis of statistical data that overwhelmingly supports this rational basis is presented in Point II, *infra.*

At this juncture, however, *amici* would pose the question to the court of what benefit the Equal Protection Clause bestows upon law-abiding citizens. Do we not have a fundamental right to be free from violent crimes? Do we not have the fundamental right to pursue the prosecution of those who would commit the most reprehensible of sexual crimes, without the fear and intimidation inherent in the knowledge that the offender is free on bail? Are the citizens of our states not free to mandate by overwhelming popular vote that those who are charged with sexual offenses, where the proof is evident or the presumption great, be isolated and prevented from repeating their attacks on innocent victims?

Amici would ask this court to consider the rights of the law-abiding in resolving the constitutional issues, not simply the individual rights of those arrested for violent sex crimes where the proof is evident or the presumption great. Indeed, this latter provision in the Nebraska Constitution is sufficient procedural protection for any person arrested for such an offense, making it highly unlikely that an innocent defendant would be denied bail in such a case.

II.

AS A MATTER OF PUBLIC POLICY, THE PEOPLE OF A STATE MUST BE ABLE TO TAKE RESPONSIBLE AND CONSTITUTIONAL MEASURES TO SECURE THEIR SAFETY AND WELL-BEING.

A.

Pretrial Release Must Be Viewed As a Two-fold Function: That of Assuring a Defendant's Appearance At Trial and That of Protecting Our Citizens.

While bail has never been perceived as an absolute right in our American system of justice, so, too, must it not be perceived as a single function mechanism in this framework. Some have

viewed the primary function of bail as a method of assuring that a defendant will appear at his trial. There is a significant danger, however, in accepting this as the sole purpose and function of bail. Pretrial release, by its very nature and practical application, can and must also be a method of protecting the public.

On February 8, 1981, in his Annual Report on the Judiciary to the American Bar Association, the Chief Justice of this Court directly addressed this point, when he stated:

> I am not advocating a new idea but merely restating an old one that we have ignored. At this point judicial discretion and judicial restraint require me to stop and simply to repeat that governments were instituted and exist chiefly to protect people. If governments fail in this basic duty they are not excused or redeemed by showing that they have established the most perfect systems to protect the claims of defendants in criminal cases. *A government that fails to protect both the rights of accused persons and also all other people has failed in its mission.* (Emphasis added) 67 American Bar Association Journal 292 (1981).

Without minimizing the need to secure a defendant's presence at trial, *amici* suggest that sole reliance on this function as the basis for bail would foster a situation where the defendant who aggravates his initial charge by merely forgetting or misconstruing his court date would be locked up; while a defendant who repeatedly aggravates his initial charge by going on a crime spree, yet continues to faithfully appear before the court, is free to continue his illegal activities at least until the time of a conviction. We must then pose the question of whether our jails are more suitably used for protecting us from the confused or absent-minded defendant who fails to appear, or those who pose a significant and on-going threat to the safety and security of our citizens through their continuing criminal conduct.

An additional consideration of the misconception that pretrial release is solely for the purpose of assuring the defendant's appearance at trial is the effect such a view has on deterrence of crime. When a dangerous defendant is released on bail, he is not only placed in a position enabling him to commit further crimes, but he is in a position to do so without any significant threat of further sanctions. The Chief Justice took a practical view of this when he stated:

> It is clear that there is a startling amount of crime committed by persons on release awaiting trial, on parole, and on probation release. It is not uncommon for an accused finally to be brought to trial with two, three, or more charges pending. Overburdened prosecutors and courts tend to drop other pending charges when one conviction is obtained. Should we be surprised if the word gets around in the "criminal community" that you can commit two or three crimes for the price of only one and that there is not much risk in committing crimes while awaiting trial? (footnote omitted) 67 American Bar Association 292 (1981).

Our system of criminal justice is founded in large part on the concept of deterrence. The legal mechanisms which subvert that concept greatly undermine any potential for effective law enforcement. Bail provisions which do not consider the government's responsibility of protecting its citizens readily fall into this category. Yet for the most part, the bail provisions of the various states and the federal government have been of the assurance type, rather than deterrence type. Thirty-one states have constitutional provisions granting bail as a matter of right in all criminal offenses except capital offenses under various circumstances. See *Forcible Rape and the Right to Bail,* 17 San Diego L. Rev. 1061, 1066. n. 29 (1980). Even though defendants accused of capital offenses are denied bail under these provisions, they must still be considered assurance-type provisions. In *State* v. *Konigisberg,* 33 N. J. 367, 164 A. 2d 740 (1960), the court illustrated this point by stating, "the underlying motive for denying bail in . . . capital cases is to assure the

accused's presence at trial. In a choice between hazarding his life before a jury and forfeiting his . . . property, the framers of the Constitution obviously reacted to man's undoubted urge to prefer the latter." 164 A. 2d at 743.

Typical of the assurance-type state bail provision is that of California where Cal. Const. Art. I, § 12 states "A person shall be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great."

Similarly, the federal Bail Reform Act of 1966 (18 U. S. C. § § 3141-3152 (1976)) has failed to recognize and give legitimacy to the function of protecting society. Indeed, the congressional declaration of purpose explicitly rejected such an interest when it stated:

> This legislation does not deal with the problem of the preventive detention of the accused because of the possibility that his liberty might endanger the public, either because of the possibility of the commission of further acts of violence by the accused during the pretrial period, or because of the fact that he is at large might result in the intimidation of witnesses or the destruction of evidence. H. R. Rep. No. 1541, 89th Cong., 1st Sess. 1 (1966).

Even though the assurance-type bail provision prevails, it has long been acknowledged that common practice has allowed the setting of high bail for defendants who are believed to be of significant danger to the community, regardless of the likelihood of the defendant's appearing at trial. See U. S. Dept. of Justice, *Proceedings and Interim Report of the National Conference on Bail and Criminal Justice,* (1965); *Footnote to Furman: Failing Justification for the Capital Case Exception to the Right to Bail After Abolition of the Death Penalty,* 10 San Diego L. Rev. 349 (1973); and *Forcible Rape and the Right to Bail,* 17 San Diego L. Rev. 1061, 1068 n. 37 (1980).

Furthermore, the American Bar Association has aptly identified the conflict inherent in a legal framework which formally provides only the assurance-type of bail provision, but

which, in reality, practices deterrence as well. The commentary to the ABA Project on Minimum Standards for Criminal Justice Standards Relating to Pretrial Release (1968) states:

> It is no secret that many judges when faced with a defendant whom they fear will commit "additional crimes" if released, feel compelled to set bail beyond his reach. In effect, bail is used to deny rather than to facilitate pretrial release . . . So-called preventive detention should be dealt with openly and on its own merits, not masked behind manipulation of bail amounts.

It therefore is imperative to acknowledge that pretrial release does have two functions, and that neither is to be subservient to the other. A government's responsibility must be extended to that of protecting its citizens and this must be balanced with the assurance of appearance at trial.

A state constitutional amendment which is based on government's duty to enhance the safety of its law-abiding citizens through tighter bail provisions has seen increased support and endorsements during the past year. The Chief Justice of this Court has placed bail revision among the highest priorities in confronting the problems of crime. He has stated, "A second step [to achieve deterrence] is to re-examine statutes in pretrial release at every level." 67 ABA Journal 292 (1981), and, "Here are a few steps which ought to be considered: (1) Restore to all pretrial release laws the crucial element of dangerousness to the community, based on a combination of the evidence then available and the defendant's past record, to deter crime while on bail; . . ." 67 ABA Journal 293 (1980).

Additionally, *amici* note that the Attorney General's Task Force on Violent Crime-Final Report makes a similar recommendation when it states, "The Attorney General should support or propose legislation to amend the Bail Reform Act that would accomplish the following: (a) Permit Courts to deny bail to persons who are found by clear and convincing evidence to present a danger to particular persons or the community." 29 CrL 3133 (1981).

B.

A State Has a Compelling Interest in Denying Bail to Those Accused of Sexual Offenses Involving Penetration by Force or Against the Will of the Victim, Where Proof is Evident or the Presumption Great.

In 1977, this Court characterized the crime of rape as follows:

> It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the "ultimate violation of self." It is also a violent crime because it normally involves force, or the threat of force, or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community's sense of security, there is public injury as well.

Coker v. *Georgia*, 433 U. S. 584 at 597-98 (1977).

Since the time that the court made this statement in *Coker*, it is likely that there have been more than one quarter of a million forceable rapes in this country. The best law enforcement efforts in the world have not only been unable to impact effectively on this crime, they have been unable to stop or even slow the annual progressive increases in victimization. Table 1 presents the FBI's Uniform Crime Reports statistic of this offense from 1960 to 1979. While criminal justice statistics are often suspect and open to varying interpretations, the frequency and increase of the offense of forcible rape is startling, appalling—and unchallenged. In no year since 1960 has the number of forcible rapes failed to increase. That number has risen so steadily that it almost exactly doubles every 10 years! Furthermore, the frequency rate per 100,000 inhabitants has increased every year since 1963. Charts 1 and 2 graphically illustrate the dimensions of these increases. From 1975 to 1979, the number of forcible rapes increased by a dramatic 31 per cent.

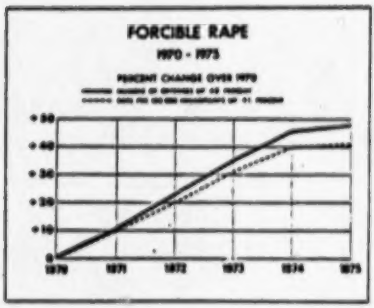
TABLE 1

Index of Forcible Rape in the United States (1960-1979)

Year	Number of Offenses	Rate per 100,000 Inhabitants
1960	17,190	9.6
1961	17,220	9.4
1962	17,550	9.4
1963	17,650	9.4
1964	21,420	11.2
1965	23,410	12.1
1966	25,820	13.2
1967	27,620	14.0
1968	31,670	15.9
1969	37,170	18.5
1970	37,990	18.7
1971	42,260	20.5
1972	46,850	22.5
1973	51,400	24.5
1974	55,400	26.2
1975	56,090	26.3
1976	56,730	26.4
1977	63,020	29.1
1978	67,131	30.8
1979	75,989	34.5

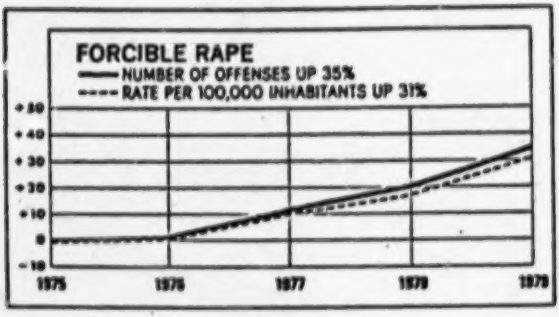
FEDERAL BUREAU OF INVESTIGATION, U. S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 13 (1979).

CHART 1



1975 FBI Uniform Crime Reports, Crime in The United States, U. S. Dept. of Justice (1976).

CHART 2



1979 FBI Uniform Crime Reports, Crime in the United States, U. S. Dept. of Justice (1980).

When this offense is compared to murder and non-negligent manslaughter, we find that forcible rapes are more than three times as prevalent. In 1960, there were 9,110 known offenses of murder and non-negligent manslaughter and 17,190 of forcible rape, a ratio of less than 1 to 2. By 1977, there were 19,120 known offenses of murder and non-negligent manslaughter, compared to 63,020 of forcible rape, showing a ratio of *more* than 1 to 3. Additionally, while in no year did the frequency of forcible rapes decline over that period, there were four years when the number of murders and non-negligent homicides were actually less than the prior year. Sourcebook of Criminal Justice Statistics, 1979, p. 402.

The data discussed above obviously include only those offenses which were reported to the police. It is generally acknowledged that the offense of rape is one of the most under-reported crimes. There are many reasons why victims fail to report this offense. Among the reasons that are most pertinent to the issues in this case are the emotional ordeal of criminal prosecution and the fear of retaliation by the offender. An offender who is free on bail not only has the ability but the incentive to threaten and intimidate the victim, who is generally the sole witness for the prosecution. Victims must have confidence that the criminal justice system will afford a reasonable assurance of protection if they cooperate in the prosecution of alleged offenders. What assurance can they be given when they know that the offender is out of jail only hours after his apprehension?

Victimization studies report widely varying data. The Law Enforcement Assistance Administration (L. E. A. A.) National Crime Survey projected that in 1977, there were 90,136 reported rapes and attempted rapes, while 64,102 such incidents went unreported. Sourcebook p. 328. This would appear to be one of the most conservative figures for this type of study. See, e. g., *Forcible Rape and the Right to Bail,* 17 San Diego L. Rev. 1061 at 1064, n. 15 (1980), where it is pointed out that similar studies indicate the ratio of reported to unreported rapes may be as high as *one to three* or *one to five.*

While the data discussed above provides a disturbing view of the scope of the offense of rape, a key issue in the instant case is that of the dangerousness of accused rape offenders *while awaiting trial.* Recidivism data is often inconsistent. However, several reports indicate quite clearly that individuals who have committed rapes tend to repeat. A follow-up study of paroled inmates indicates that from 1974 through 1976, of those inmates imprisoned for forcible rape who had been paroled and then found to commit a subsequent offense, 26.7 per cent had again committed a forcible rape. The comparable figure for willful homicide is 16.3 per cent. Sourcebook p. 669. This difference cannot be overlooked. It provides a rational basis for legislative and constitutional choices in the area of bail reform, specifically in the category of violent sex offenders.

A number of controlled studies give added credibility to the concept of the dangerousness of rape defendants. A 1977 report from the respected social science study group, the Battelle Memorial Institute, illustrates the prior arrest background of rape suspects as reported from a sampling of police agencies. This data is included as Table 2. Forcible Rape, A National Survey of the Response by Police, Police Volume 1, National Institute of Law Enforcement and Criminal Justice, L. E. A. A., U. S. Dept. of Justice, p. 24 (1977). Similarly, Table 3 illustrates the comparable statistics for those suspects actually prosecuted. Forcible Rape, A National Survey of the Response by Prosecutors, Prosecution Volume 1, National Institute of Law Enforcement and Criminal Justice, L. E. A. A., U. S. Dept. of Justice, p. 17 (1977).

TABLE 2

Offender Arrest Record

Categories	Over 500K	100—500K	County	Under 100K
Offenders with previous arrest records for:				
• rape	17.5%	27.8%	23.4%	21.5%
• other sex offenses	19.5%	30.2%	26.7%	18.8%
• other violent offenses	40.6%	28.6%	34.3%	36.0%

Forcible Rape, A National Survey of the Response by Police, Police Volume 1, National Institute of Law Enforcement and Criminal Justice, L. E. A. A. U. S. Dept. of Justice (1977)

TABLE 3

Accused With Previous Arrest Records

Categories	Mean Percentage by Population of County		
	Large	Medium	Small
Rape	26%	16%	17%
Other Sex Offenses	24%	22%	12%
Other Violent Offenses	38%	25%	22%
Felonies (Non-Violent Crimes)	28%	23%	23%

Forcible Rape, A National Survey of the Response by Prosecutors, Prosecution Volume 1, National Institute of Law Enforcement and Criminal Justice, L. E. A. A. U. S. Dept. of Justice (1977)

A study of the backgrounds of 90 rapists who had been sentenced in California under determinate sentencing laws in 1977 and 1978, showed that 86 per cent had at least one prior felony conviction. Yet remarkably, 76 per cent were imprisoned for the first time. Fifty-three per cent of these men had prior convictions for violent offenses. In 31 per cent of the cases, the records showed at least one prior rape conviction; with an additional 12 per cent having been arrested for rape, but not convicted. *Rape and Sexual Assault,* Ed. by C. G. Warner, Aspen Publication (Maryland, 1980).

The most disturbing data of all comes from the Battelle study mentioned above:

> [T]he rapists interviewed at Atascadero demonstrated a wide range of previous criminal experience. Official records listed a total of 142 rape convictions or arrests among the group; and the subjects admitted to 69 additional rapes for which they had not been apprehended. Arrests for sex offenses other than rape were extremely rare.
>
> Arrests for non-sexual offenses usually were for violent crimes such as roberry [sic] and assault. More than three quarters of the offenders had at least one previous arrest for robbery or assault; five had been arrested for homicide or assault; five had been arrested for homicide and three convicted of rape/homicide. Eighty per cent of these men had one or more adult burglary arrests.
>
> Although this group of offenders is *not* representative of the entire rape offender population, their history of both violent and non-violent criminal offenses is impressive. Even more striking, perhaps, is the repetitiveness of the criminal acts. For example, the number of rape offenses committed by this small group alone approximates the number of rape reports we would expect in a given year in a city of 350,000-400,000 people.

Forcible Rape, Final Project Report, National Institute of Law Enforcement and Criminal Justice, L. E. A. A., Dept. of Justice, p. 11 (1978).

Amici suggest that the data reported here is compelling. The citizens of the states must be heard on the issues which so directly threaten their physical and emotional well-being. The Nebraska Constitutional Amendment denying bail to those charged with rape where the proof is evident or presumption great received a popular vote with a margin of 4 to 1 in favor. To hold such an action unconstitutional in the face of the compelling need and overwhelming popular support would strike a devastating blow to the citizens of that state, to those who fear to go beyond the locked doors of their homes after dark, and to the victims of these increasingly frequent violent crimes. It quite simply would be a major affront to law-abiding citizens and violative of their right to be secure in their persons.

We respectfully submit that the issue goes beyond that of merely making a rational legislative or referendum choice that can stand the test of constitutional muster, although we believe that the test has been well met in this case. It involves the fundamental right of a people to defend their bodies and their minds from the devastating physical and mental damage wreaked by this dreaded, fear-producing crime. It involves a major issue of preserving the physical and mental health of the law-abiding citizens of our country. This court can strike a major blow by its decision in this case to reverse, *here and now*, this disturbing condition which threatens to all but wipe out the social, cultural and economic achievements of our society. As aptly stated by James P. Damos, President of IACP,

> Until we begin to address the needs of crime victims and witnesses on the highest possible priority, I believe we have little hope of a recession in crime rates.
>
> The problem is so pervasive that the perception of crime, as "fear factor" now exceeds the actual incidence of crime . . . A sense of helplessness permeates our society and drives people into a "fortress" mentality, locking themselves in their homes after dark and praying for one

> more day free from crime . . . This nation can ill afford the monumental losses to its cultural development and productivity that are caused by an inability to move freely about our central cities. We must return our lines of communication to the law abiding citizen and get on with the business of producing America's goods and services. *Editorial,* XLVIII The Police Chief 8 (October 1981).

We respectfully submit that the Court's decision should permit the states to adopt statutes and state constitutional provisions giving effect to the needs of our law-abiding citizens, as represented by the following recommendation of L.A.W. in its 1973 Court Reform Blue Ribbon Report, at p. 12:

> The purpose of bail is to provide some assurance that the defendant will appear for trial. There are many factors that bear upon this problem. Some of these factors are whether or not the defendant has roots in the community, the presence or absence of a past criminal record, severity of the crime, etc.
>
> However, these factors only help determine the *amount* of bail that should be set by the court. There are some cases where *no* bail should be set at all because of the fact that the defendant's release poses a real threat to the community or to himself.

CONCLUSION

Amici respectfully submit that the findings of the United States Court of Appeals for the Eighth Circuit be reversed on the law and on the basis of sound judicial policy.

Respectfully submitted,

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